90-469

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

Case No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1990

BETTY D. MCCALL

Plaintiff-Petitioner

v.

UNITED STATES OF AMERICA

Defendant-Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The issue presented for review is whether a Federal employee, injured by medical malpractice occurring in the treatment of injuries originally sustained in the course of her federal employment, may maintain a federal tort claim for damages caused by such medical malpractice or whether the federal tort claim is barred by the exclusive remedy provisions of the Federal Employees Compensation Act, 5 USC Section 8116(c).

PARTIES TO THIS PROCEEDING

Betty D. McCall and,

The United States of America

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JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit in this case was filed on April 27, 1990. The Order denying Petitioner's Petition for rehearing was filed on June 17, 1990. Jurisdiction is conferred upon this court by 28 U.S.C. Section 1254.

5 U.S.C. Section 8116(c):

(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

STATEMENT OF THE CASE

Petitioner, Betty D. McCall, brought this medical malpractice action under the Federal tort claims act (28 U.S.C. Sections 2671 et. seq.) in the United States District Court for the Southern District of Ohio, Western Division, to recover for injuries and damages caused by the medical negligence of United States Air Force physicians. The alleged acts of malpractice occurred during the treatment of injuries originally sustained in the course of Mrs. McCall's Federal employment at Wright Patterson Air Force Base. The malpractice occurred in the Wright Patterson Air Force Base Medical Center where Mrs. McCall was entitled to treatment both as Federal employee injured on the job and as the widow of a deceased noncommissioned officer.

Mrs. McCall was originally injured on June 10, 1981. Respondent's acts of malpractice occurred on or after June 12,

1981. The Department of Labor awarded Mrs. McCall total disability compensation under the Federal Employee's Compensation Act, 5 U.S.C. 8101 et. seq. (FECA) from July 26, 1981 to May 9, 1983, and partial disability compensation from May 9, 1983, through August 26, 1983.

Mrs. McCall's FECA benefits were terminated effective August 26, 1983, with the Secretary of Labor finding that she was no longer disabled from her work related injury. This Federal tort claim was filed on April 26, 1984. Respondent filed its Motion to Dismiss on December 9, 1985.

However, on March 21, 1986, a hearing representative for the office of Workers Compensation Programs reinstated Mrs. McCall's disability benefits for the employment injury of June 10, 1981, finding that the Secretary of Labor failed to carry its burden of proof in terminating her benefits.

Respondent's Motion for Summary Judgment was originally denied. McCall v. United States, 680 F Supp. 283 (S.D. Ohio 1987). Respondent moved for reconsideration and four days before trial, on April 26, 1989, the District Court changed its mind and granted Respondent's Motion for Summary Judgment.

ARGUMENT

Betty McCall fell and was injured in the course of her employment with the Federal Government. While it is clear that her initial injury is compensable under the FECA, and while it is equally clear that she can not maintain an action against the Federal Government for those injuries, it is not clear whether subsequent injuries caused by the medical malpractice which occurred after the initial work related injury are either compensable under the FECA or barred by the exclusivity provisions of that act.

Several cases cited by the Court of Appeals and Respondent hold that the FECA covers additional injuries caused by negligent treatment of a compensable injury. Wilder v. United States, 873 F.2d 285 (11th Cir. 1989); Baker v. Barber, 673 F.2d 147 (6th Cir. 1981); Gold v. United States, 387 F. 2d 378 (3rd Cir. 1967); Balancio v. United States, 267 F.2d 135 (2nd Cir.) cert. denied, 361 U.S. 875 (1959).

However, in Wright v. United States, 717 F.2d 254 (6th Cir. 1983). The Court of Appeals held that the negligent treatment of a compensable injury is not covered by the FECA.

In Wright a Federal employee became ill while at work at a Veterans Administrative Hospital. Hospital personnel allegedly treated her negligently causing her injury. The Court of Appeals held in part that Wright was entitled to bring a Federal tort claim based upon the

"dual capacity" doctrine. Id. at 259. The Court held:

> In the present case, the Veterans Administration Hospital had a dual capacity relationship with Wright. She was both employee and patient of the hospital. Initially, the hospital was an employer supervising her work as a secretary. Later when the doors of the emergency room swung open, Wright's relationship to the hospital changed...
>
> The Federal Tort Claims action would not undermine the goals of the FECA because the employer-employee relationship is not the basis of the action.

Betty McCall was initially injured in the course of her Federal Employment. She was not required to, but did, seek medical care for that injury at a Federal facility where she was entitled to treatment both as an injured employee and as the widow of a noncommissioned officer. While undergoing treatment for her injury she was not acting as an employee, nor was the United States

acting as her employer. After the initial injury a physician/patient relationship was established apart from the employment relation. It was in this physician/patient relationship that the medical negligence and subsequent injury occurred.

If a civilian doctor had negligently treated Mrs. McCall for her employment injury she could maintain a tort action against that doctor. There is nothing in the FECA compelling the conclusion that such subsequent acts of negligence and resulting injuries are covered by the FECA or fall under exclusivity provisions of the act. There is nothing in the FECA allowing the United States to shelter its own medical malpractice under the restricted compensation scheme of the FECA.

This question has not been decided by this Court. There is a conflict within and between the circuits on this issue. This is

an issue that will arise more often as the Federal Government steadily increases its role as the provider of medical and other services in relation to the many millions of Federal employees. This question should be decided now to avoid future litigation which is sure to follow.

For the reasons stated in this Argument, Petitioner, Betty D. McCall respectfully requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,

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RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

No. 89-3487

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BETTY D. MCCALL,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed April 27, 1990

Before: WELLFORD and NELSON, Circuit Judges; and ZATKOFF,* District Judge.

WELLFORD, Circuit Judge. Appellant Betty McCall, a federal civilian employee, was injured at work, and was compensated under the Federal Employees Compensation Act (FECA), 5 U.S.C. §§ 8101-8193. She was treated for her injuries at a military hospital on the grounds of the military base where she worked, and she alleges in this action against the government that she was a victim of medical malpractice. At issue is whether she was compensated under FECA for

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*The Honorable Lawrence P. Zatkoff, United States District Judge, Eastern District of Michigan, sitting by designation.

the injuries sustained as a result of the alleged malpractice, and whether she is entitled to sue under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680, under the circumstances of this case.

A contract specialist at Wright-Patterson Air Force Base in Ohio, McCall slipped on some stairs and fractured her hip in the course of her civilian employment on June 10, 1981. She was taken to the Base Medical Center, where she was treated on an inpatient basis for one month, and later on an outpatient basis. She was entitled to treatment at the military base for two independent reasons—because her injury occurred in the course of her employment, and also because she was a dependent spouse of a deceased member of the armed services.

McCall filed a claim with the appropriate office of the Department of Labor (DOL) for FECA benefits. DOL granted total disability compensation for the period from July 26, 1981 to May 9, 1983, and partial disability compensation for the period from May 9, 1983 to August 23, 1983. There was evidence of her partial recovery in 1983. McCall filed an administrative appeal of the August 23, 1983 cutoff of FECA benefits, contending she was unable to return to her past employment. DOL concluded that the agency had failed to carry its burden of proof with respect to termination of FECA benefits, and restored McCall's FECA compensation from August 26, 1983 forward.

In 1984, McCall filed this action in the district court, seeking compensation for alleged medical malpractice in the initial surgery and rehabilitation treatment following her accident. The suit was filed under the FTCA. In her complaint, McCall alleged that the improper medical treatment made it necessary to undergo surgery a second time in September 1981, and she sought substantial damages for pain, suffering and permanent disability.

The district court granted the government's motion for summary judgment, ruling that there was no genuine issue of material fact on the question of whether McCall had received compensation for her injuries sustained as a result of the alleged malpractice under FECA, whose remedies were held to be exclusive. Although this was the sole basis for the district court's decision, the government had argued in the alternative that even if McCall was not actually compensated under FECA, she was entitled to FECA compensation, and that the FTCA action should likewise be barred because of FECA's exclusivity provisions.

I.

Recovery for injuries covered under FECA is clearly limited and exclusive:

> The liability of the United States . . . under this subchapter . . . with respect to the injury . . . of an employee is exclusive and instead of all other liability of the United States . . . to the employee . . . or any other person entitled to recover damages from the United States . . . because of the injury . . . in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute.

5 U.S.C. § 8116(c); *Baker v. Barber*, 673 F.2d 147, 148 (6th Cir. 1982) ("[t]his provision precludes recovery under the Tort Claims Act if relief is already available under the FECA.").

In enacting the exclusive-liability provision,

> Congress adopted the principal compromise—the "*quid pro quo*"—commonly found in workers' compensation legislation: employees are guaranteed the right to receive immediate, fixed benefits, regardless

was injured in the course of employment and alleged malpractice. The court, in a brief per curiam opinion, held that FECA, "to which the plaintiff had resorted prior to the institution of the instant action, is the exclusive remedy available to the plaintiff." 387 F.2d at 379.

In *Balancio v. United States*, 267 F.2d 135 (2nd Cir.) (Hand, J.), *cert. denied*, 361 U.S. 875 (1959), the same factual situation presented itself, and the court held that the FTCA claim was barred:

> [T]he aggravation of [plaintiff's] initial injuries, suffered while he was indubitably in performance of his duty, should be regarded as resulting from the initial injuries themselves. . . . [T]hat is the rule at common-law when the claim is for negligence; the initial wrong is the cause of all that follows, even when there has intervened a succeeding negligent act that produced the aggravation. We interpret [FECA] as a substitute for the whole of the claim that, but for it, would have arisen under the Torts Claim Act.

267 F.2d at 137.

Finally, *Wilder v. United States*, 873 F.2d 285 (11th Cir. 1989), involved a comparable situation, with the exception that compensation for the initial injury was under the Nonappropriated Fund Instrumentality Act (NFIA), 5 U.S.C. §§ 8171-73. That act contains an exclusive-remedy provision substantially identical to FECA's section 8116 (c). The court held:

> We are satisfied, and so hold, that the aggravation of her work-related injuries through the alleged malpractice of treating medical personnel presents a substantial question of coverage under the LHWCA [made applicable via NFIA], and a more conclusive determination is unnecessary. . . . Until Wilder has made an application for benefits and had it denied, she cannot pursue her remedy under the FTCA.

873 F.2d at 288 (footnote omitted).[1]

Appellant attempts to rely on our "dual capacity doctrine" decision in *Wright v. United States*, 717 F.2d 254, 257 (6th Cir. 1983). *Wright*, we believe, is distinguishable. In that case, the plaintiff was injured while at work, but her injury, a ruptured tubal pregnancy, was *not work-related*. Wright's attempt to claim FECA benefits was denied as not timely filed, but the letter from the DOL claims examiner denying benefits also stated that her initial injury was "a pre-existing personal pathology which is not job-related" and thus not covered by FECA. Another distinguishing factor is that Wright's primary malpractice complaint was that improper use of a respirator damaged her trachea, an injury quite distinct from the one that brought her to the hospital in the first place. On the particular facts of that case, we applied the dual capacity doctrine:

> An employer may become a third person, vulnerable to tort suit by an employee, if—and only if—he possesses a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person.

Wright, 717 F.2d at 259, quoting 2A Larson, Workmen's Compensation Law 14-229, Section 72.81 (1982).

McCall's case is plainly different from the facts in *Wright*, whose holding was based on the "unique circumstances" of

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[1]Two cases contain similar holdings regarding initial injuries covered under 18 U.S.C. § 4126, which provides the exclusive remedies for federal prisoners injured in the course of performing prison jobs. *Wooten v. United States*, 825 F.2d 1039, 1044 (6th Cir. 1987) ("[s]ection 4126 is also the exclusive remedy when a work-related injury is subsequently aggravated by negligence and malpractice on the part of prison officials . . ."); *accord, Thompson v. United States*, 495 F.2d 192 (5th Cir. 1974).

the case. 717 F.2d at 260. McCall's initial injury was clearly suffered in the performance of her duties. The alleged malpractice injury was closely related to the initial injury. This case also differs from *Wright* in that there has been found to be FECA coverage involved.

IV.

The Secretary of Labor's sole discretion under FECA set out in section 8145, the unreviewability of such action under section 8128(a), and the resulting rule that federal courts "lack subject matter jurisdiction to consider an action where there is a substantial question of FECA coverage," present the major bar to McCall's cause of action under FTCA. *Wright v. United States*, 717 F.2d 254, 257 (6th Cir. 1983); *Joyce v. United States*, 474 F.2d 215, 219 (3rd Cir. 1973); *Concordia v. United States Postal Service*, 581 F.2d 439, 442 (5th Cir. 1978); *Reep v. United States*, 557 F.2d 204, 207 (9th Cir. 1977). A substantial question "is generally present where the Secretary has undertaken an 'action' to award or deny FECA benefits." *Wright*, 717 F.2d at 257, citing *Gill v. United States*, 641 F.2d 195 (5th Cir. 1981).

We conclude that appellant is precluded from asserting independent liability under the FTCA; accordingly, we **AFFIRM** the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BETTY D. McCALL,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	Case No.
	:	C-3-84-359
UNITED STATES OF AMERICA,	:	
	:	
Defendant,	:	

DECISION AND ENTRY SUSTAINING DEFENDANT'S MOTION TO RECONSIDER (DOC. #28); SUMMARY JUDGMENT GRANTED IN FAVOR OF THE DEFENDANT AND AGAINST THE PLAINTIFF HEREIN; PLAINTIFF'S MOTION IN LIMINE (DOC. #61) DEEMED MOOT; TERMINATION ENTRY

Based upon the record made by this Court, during a telephone conference call between Court and counsel held on Wednesday, April 26, 1989, this Court finds well taken and does, therefore, sustain the Motion of the Defendant (Doc. #28), seeking an Order of the Court reconsidering its Decision of April 20, 1987 (Doc. #20), which denied the Defendant's Motion to Dismiss or in the Alternative for Summary Judgment (Doc. #11).

Upon reconsideration, this Court grants the Defendant's Motion for Summary Judgment and, in so doing, directs the entry of final judgment in favor of the Defendant and against the Plaintiff herein. In ruling as aforesaid, as is more fully set forth upon the aforesaid record, this Court concludes that there does not exist a genuine issue of material fact on the question of whether the Plaintiff has, in fact, received compensation for her "malpractice injuries" from the Federal Employees Compensation Act.

Having ruled as aforesaid, the Plaintiff's Motion seeking an Order of this Court in limine (Doc. #61) is deemed by the undersigned to be moot and same will, therefore, not be ruled upon.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

Walter H. Rice
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

* * *

Betty McCall,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	Case No. C-3-84-359
	:	
The United States of America	:	
	:	
Defendant.	:	

* * *

CONFERENCE CALL
April 26, 1989

* * *

THE HON. WALTER H. RICE
Judge presiding

* * *

Appearances:

On Behalf of the Plaintiff:

Carmine Garofalo, Attorney at Law

On Behalf of the Defendant:

Gerald Kaminski,
Assistant United States Attorney

Wednesday Afternoon

April 26, 1989

In Chambers

THE COURT: This is case C-3-84-359, captioned Betty D. McCall versus United States of America. The government is represented by Mr. Gerald Kaminski and the plaintiff by Mr. Carmine Garofalo.

Let me share with you some basic thoughts and then I want to hear what you have to say. We're here on two motions. The first is the United States motion to reconsider, document number 28, to reconsider this Court's April 20, 1987, decision and entry which overruled defendant's motion to dismiss or in the alternative for summary judgment. That decision is set forth in document 20. We're also hereon the plaintiff's motion in limine, document number 61.

I don't think the history leading up to my decision of April 20, 1987, overruling

defendant's motion to dismiss or in the alternative for summary judgment is necessary, but suffice it to say the government's motion for reconsideration, while couched in terms of almost obsequious respect, makes it clear that in its opinion the Court erred on both grounds. And, Jerry, I hope you know I'm being facetious.

The government indicated that the Court had misapplied or applied erroneously the dual capacity rule and indicated, in addition, that the plaintiff is already receiving compensation under FECA which, if true, would preclude her alternative -- which would preclude an alternative remedy under the Federal Tort Claims Act.

I'm not going to deal with the issue of the dual capacity rule simply because I don't think it's necessary for me to do so because I feel the motion can be dealt with on the government's contention that since the plaintiff is already receiving payments under the Federal Employees Compensation

Act, not only for the initial slip and fall, but also for the alleged sequelae, the medical malpractice at the Air Force base hospital, that motion to reconsider must be sustained.

This Court, I feel, has no alternative but to enter summary judgment in favor of the defendant and against the plaintiff herein on the grounds that the defendant, the moving party, has shown that there does not exist any genuine issue of material fact on the issue of whether the plaintiff is presently being compensated under FECA for the medical malpractice at Wright-Patterson Air Force Base hospital, the very act which formed the basis of this litigation here in court. I will try to set forth my reasons and then, Carmine, I want to hear your response.

The government has submitted a declaration of Bruce King. It's properly verified. Mr. King has indicated that he is the acting director of the Cleveland

district of the office of workers' compensation programs, employment standards administration, United States Department of Labor.

He goes on to say that he has personal knowledge of the plaintiff's file and the official records and he has personal knowledge of the information contained therein. He goes on to say that in his opinion the award, award of compensation which is still being paid, included compensation for the injuries which the plaintiff sustained as a result of the job-related slip and fall of June 10, 1981, as well as the consequential injuries she incurred in the course of her medical treatment for those injuries at Wright-Patterson. Of course, it's the latter injury that forms the basis of the plaintiff's Federal Tort Claims Act.

Attached to Mr. King's or attached to the documents, not in Mr. King's affidavit in support of a motion to reconsider, but

attached to his affidavit which is appended to the memorandum filed in opposition to the plaintiff's motion in limine are payment records coming from Mr. King's office. Those payment records show payments to Dr. Paley. Dr. Paley, of course, is the doctor that performed corrective surgery needed to correct the results of the medical malpractice injury.

In this Court's opinion, Mr. King has rendered an opinion, but I think it is an opinion he is capable of giving based on the records that he has reviewed. It is an opinion that he is capable of giving because even if you assume he's a nonexpert under Rule 701 of the rules of evidence, there has been a foundation laid for that opinion.

Now, the hearing -- as I've indicated the payment records support Mr. King's affidavit. Also, the hearing held in 1986 which came out under date of March 21, 1986, concerning the continuation of her disability, the plaintiff's disability

between the date of the hearing and the then termination date of August 26, 1983, I think supports the determination of Mr. King. Keep in mind that the plaintiff was initially given total disability payments. Then she was reduced to partial disability payments. And I think it can be inferred that malpractice was included in those compensation payments because in the redetermination hearing, the conclusion was that the plaintiff should be paid in an amount or based upon what Dr. Paley, the physician who performed the corrective surgery, said she, the plaintiff, could manage, and I believe Dr. Paley indicated she could manage four hours a day.

Now, in opposition to this, in opposition to the government's point that the plaintiff has received compensation under FECA for the medical malpractice injuries, plaintiff, I believe, has produced nothing other than a statement in a memorandum contra that what Mr. King says

simply isn't so. There is also floating about a letter from Senator Glenn which, I think, supports the defendant's contention that the plaintiff has already been compensated or is being compensated under FECA for the medical malpractice injury. I have not considered that letter, although I think that it comes close to being a judicial admission, simply because that letter is not certified or authenticated pursuant to federal Rule 56. And that letter basically says, and I'm frantically looking for it, if you'll give me about 15 seconds of dead mike time, I'd appreciate it. That letter says -- that letter is from Carmine Garofalo to Senator Glenn and basically refers to a court of appeals case from the Sixth Circuit which says that if a government employee is injured in the course of employment and thereafter is injured again by the malpractice of a government doctor, the employee's sole remedy is FECA and can't pursue a separate claim for

medical malpractice under the Federal Tort Claims Act. Whether that's a correct interpretation of Carmine's letter or not, I prefer not to get into because, as I've said, that's not a properly authenticated under Rule 56 letter and I have, therefore, not considered it under what I consider to be the cases that I'm bound to follow, Celotex for one and Anderson versus Liberty Lobby.

Once a party, in this case the government, has made a factual showing that it is entitled to summary judgment on a crucial issue on which plaintiff, the nonmoving party in this case, would bear the burden of proof at trial, it is then incumbent upon the plaintiff to demonstrate by proper Rule 56 materials that there does, indeed, exist a genuine issue of material fact. Under the law, as I understand it, if there has been any FECA payment, regardless of how comprehensive, regardless of how wise or how proper for the medical malpractice

claim, then the plaintiff is barred for recovery under the Federal Tort Claims Act.

In this situation, I simply conclude that based on materials now in my possession which I did not have at the time of the original decision, Federal Tort Claims -- I'm sorry -- relief under the Federal Tort Claims Act is barred because relief not only was but is being made available under the FECA. I simply don't feel that there is a genuine issue of material fact in this matter that would preclude my determination that the FECA is covering this claim.

Carmine, let me hear your response.

MR. GAROFALO: Judge, when Betty McCall filed her application for workers' compensation, which, I believe, was on June 11 or 12 -- it's in the record -- that was before any alleged malpractice had occurred. And her claim was for injuries sustained and disabilities sustained as a result of her fall at the base on June 6, 1981. When the government in its infinite wisdom decided to

terminate her workers' compensation benefits effective in August of 1983 or 1984, that decision, which, again, is in the record, was based on the fact that she was no longer disabled for any injuries she sustained in the fall of June 10, 1981. There was never any mention, there was never any consideration and there was never any finding, nor was the claim ever allowed for an aggravation of that injury or a different injury or anything dealing with subsequent medical negligence.

When Betty McCall pursued her administrative appeal through the Department of Labor office of workers' compensation programs, and you referred to that decision, Judge, which came out in March of 1986, on page one of that decision it says the issue for consideration in this case is whether disability arising out of the employment injury occurring on June 10, 1981 extended beyond August 26, 1983. That was the only thing that was considered on that appeal,

Judge. There was never any mention of, never any consideration of, never any allowance of any aggravation of that injury or making worse of that injury or whether anything was allowed for any subsequent reinjury or aggravation because of malpractice.

And that appeal held that since the government, Department of Labor, has the burden of proof to show that an employee is no longer injured, it -- that decision held that the Department of Labor had failed to do that, and the holding which is on page 19 about in the middle of the page states, "The decision of the district officer dated June 20, 1984 has been set aside." That was a decision, Judge, cutting Betty McCall off workers' comp and the claimant is to be restored to the compensation rolls for all appropriate monetary and medical benefits resulting from the employment injury of June 10, 1981. Again, no findings, no findings, no mention of an allowance for subsequent

reinjury or aggravation or new injury from the subsequent malpractice which occurred after June 12, or around June 12 and thereafter of 1981. Therefore, she has never been compensated under federal employment compensation nor could she because I don't think it's appropriate.

The reason she is receiving disability is because of her injury of initially falling down and getting hurt at the base under the Wright dual capacity doctrine. Betty McCall was hurt in the course of her employment and because of circumstances she was taken to the base hospital versus a civilian hospital and she was then reinjured or a new injury occurred because of medical negligence.

The United States stands in two capacities here, that is, as her employer and as a third party as a provider of medical care services simply because she happened to be at the base and she was a medical dependent because her husband was a

deceased Army person. So, clearly, Mr. King's declaration that she is getting benefits for this medical malpractice is just his opinion, and it's a wrong opinion because those actual documents in a work comp file that he relies on clearly state to the contrary, that the only thing that she's getting benefits for are because -- are as a result of injuries sustained in her fall. And under the Wright situation, which our Sixth Circuit decided, you know, that's clearly a separate and distinct matter and she's entitled to compensation for it.

You know, that's just his opinion. What is as of record -- yes, what's as of record and that is the workers' compensation initial decision and the decision on appeal shows the only thing she's ever gotten benefits for are for her original fall. My letter to Senator Glenn was my opinion and I was wrong. And I think the Wright decision states that, that there is a dual capacity doctrine and there's two separate and

That's something we would prove at trial. Wanted to get that on the record.

THE COURT: I appreciate you doing that. Hold for just a minute, if you would.

(Pause in proceedings.)

THE COURT: Let me make this statement. First of all, I am inclined to agree with you to a certain extent on the dual capacity rule, Carmine. I agreed with you once before, and so I have an understanding of where you are going there. I'm not adverse to your position on that.

The place where you and I still part company is on whether she's been compensated for the malpractice. Keep in mind that at least it's my understanding of both workers' compensation law and personal injury law and common law in Ohio, as well as elsewhere, that if a person is injured and goes to a hospital and is malpracticed upon, unless the malpractice can be shown to be not so much an intervening cause but a superseding cause of the original injury, then the

original tort feasor is responsible for the sequelae of the injury which could well include medical malpractice.

Now, I feel, and, again, I don't feel that I'm stretching in the least, when the hearing officer talks in terms of compensation for the injury of -- let me read it exactly. "Compensation for the employment injury of June 10, 1981." I feel, based upon the payment records and the affidavit of King, that what that person's talking about is what we in normal parlance would talk about, the injury of June 10, and any sequelae which includes the malpractice. I don't see any indication in any of these materials that the medical malpractice is a total and complete superseding cause of the plaintiff's injuries which, again, define -- let's make sure we define our terms properly. Under Ohio law, as I understand it -- give me just a moment. A superseding cause means a lack of causal connection. In other words, a

connection between the slip and fall of June 10 is broken in this case, you would argue (the plaintiff), when a subsequent act or omission, i.e., the medical malpractice intervenes and completely removes the effect of the first act of negligence and is itself the proximate cause of the injury or damages.

The causal connection of the first act, for example, the June 10 act, slip and fall, would be broken and superseded by the medical malpractice only if the intervening negligent act, and I'm using negligence language, but if the intervening malpractice is both new and independent which means there is the absence of any connection or relationship of cause and effect between the original and the subsequent act. Again, I don't feel that there is a genuine issue of material fact on this based on anything that has been presented to me within a summary judgment context. The intervening negligent act is not independent of the initial slip

and fall incident.

Carmine, let me tell you what I'm going to do. I am going to ask our court reporter, who even now is cringing as I say this, to prepare a transcript of what I've said.

MR. GAROFALO: And file it.

THE COURT: Yes. What I'll do is I will attach that to a brief entry making my ruling. You'll then have ten days, I guess, under Rule 59 to move for a new trial or to reopen, if you can show me with Rule 56 materials that your premise is correct, that she is not being compensated under FECA. I don't know any other way to handle it. I know you disagree with me, but that's about the best I can do for you at this point. Any thoughts on that?

MR. GAROFALO: Well, I'll be honest with you, Judge, unless you feel there's a reasonable basis -- yes, obviously you've reviewed this, okay, and I just told you how I feel about this, and I think it's pretty

clear that she's not. And I understand your rationale why you think she is. Unless you think there's a reasonable basis, I think we ought to get an order on and go from there.

To be honest with you, the government was going to appeal it anyway whether we won, if we won, if we had won the case. And let's just get it up to the Sixth Circuit and -- you know, my intent here is just to, you know, unless you really feel there's some way I'm going to change your mind, Judge, I don't think you do because you've obviously thought about this. I would just as soon get it to the Sixth Circuit.

THE COURT: Carmine, that's fine.

MR. GAROFALO: Does that cause you a problem? I don't --

THE COURT: Good Lord, no. If I'm wrong, I'd just as soon somebody tell me. I was simply saying that if you feel you can demonstrate the truth of what you have to say by a proper Rule 56 material, I thought I would give you the chance to present it to

me rather than chase it up on appeal, but if, as you say, the government was going to appeal anyway if it had lost, then you might as well take --

MR. GAROFALO: Jerry, am I misstating the situation?

MR. KAMINSKI: No, you're not. That's why we couldn't talk.

MR. GAROFALO: That's why we didn't settle the case. The government felt basically, Judge, if that was the law, they wanted the Sixth Circuit to reconsider it anyway.

THE COURT: Carmine, let me ask you this. I don't want to prejudice your appeal.

MR. GAROFALO: Uh-huh.

THE COURT: But would you be well advised at this point in having her make application for these things you feel she's entitled to under F or might be entitled -- withdraw that. You've indicated that as proof that she's not being compensated under

FECA she's never been awarded this or awarded that.

MR. GAROFALO: That's reflected in that decision on the appeal in the work comp case, Judge.

THE COURT: I understand that. But my question is, can you without hurting your appeal make that application?

MR. GAROFALO: There's no problem. In fact, I didn't handle her work comp case. Joe Shapiro in Cleveland did. I had written to him several occasions saying why aren't you doing this and she won't be prejudiced by it.

By the same tone, the government can take that step, too, and have her determined what her percentage of disability is. Other than that, you know , she's just got the regular remedies that you have in workers' comp. I don't think anything we do in that case is going to affect that one way or the other.

THE COURT: Then I'll get this out

and I'll put an entry on and you can go from there. Jerry, let me ask you this: Obviously, you're not interested in changing my mind at this level, but is there anything that you would want to add that would help to protect the record?

MR. KAMINSKI: Judge, I think you've stated for the record a much better argument than I could ever present to the Court. I just will go with what you've articulated in your order. I think that's more than adequate for our purposes.

THE COURT: All right. Then as soon as I have the transcript, Jerry, thank you.

MR. GAROFALO: Can I just ask you one more thing?

THE COURT: Sure can.

MR. GAROFALO: You referred to and I referred to the U.S. Department of Labor office workers' compensation decision on the appeal dated March 21, 1986. My understanding is, it is part of the record.

MR. KAMINSKI: It's an attachment to

our papers, Carmine.

MR. GAROFALO: I just wanted --

MR. KAMINSKI: It's in the record.

THE COURT: It's in the record.

MR. GAROFALO: Is that your understanding, too, Judge?

THE COURT: Yes, because I quoted from it. That's in the record.

MR. GAROFALO: Good.

THE COURT: Fellows, thank you and I'm only sorry this was slow in coming and took you to four or five days before trial. We'll get the entry on as soon as possible; and if I'm wrong, I'll do business with you again, I'm sure, on this case.

MR. GAROFALO: If you're wrong, they're probably settle with me. Thanks, Judge.

THE COURT: Fair enough.

* * *

(The conference concluded at 2:40 p.m.)

WESTERN DIVISION

BETTY D. McCALL, :

Plaintiff, :

vs. : Case Number C-3-84-359

UNITED STATES OF AMERICA :

Defendant. :

DECISION AND ENTRY OVERRULING DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT (DOC. #11); CONFERENCE CALL SET TO DETERMINE TRIAL DATE AND OTHER DATES

The Motion of the Defendant, seeking an Order of the Court, pursuant to Fed. R. Civ. P. 12(b)(11), dismissing the captioned cause for reason of this Court's lack of subject matter jurisdiction or, in the alternative, granting summary judgment in favor of the Defendant, pursuant to Fed. R. Civ. P. 56 (Doc. #11), is deemed by this Court to be not well taken and same is, therefore, overruled in its entirety.

In ruling as aforesaid, this Court makes the following, non-exclusive,

observations:

1. Plaintiff is an employee of the United States. She was injured, near the situs of her employment, during working hours on June 10, 1981. She has received compensation for this injury under the Federal Employees Compensation Act (FECA). Following her June 10, 1981, injury, she was admitted to Wright Patterson Air Force Base Medical Center wherein, she alleges, she was permanently and severely injured by the malpractice of Defendant's medical personnel.

The Defendant has moved to dismiss the Plaintiff's claim, brought under the Federal Tort Claims Act, 28 U.S.C. Section 1402, et seq., upon the basis that her exclusive remedy, not only for the initial injury which occurred during working hours near her place of employment, but also for the alleged subsequent malpractice of Defendant's medical personnel during treatment of that initial injury, is within

the confines of the Federal Employees Compensation Act (FECA) and, since that Act furnishes the exclusive remedy for the Plaintiff's injury(ies), she cannot bring a Federal Tort Claims action against the United States for the alleged medical malpractice of the Defendant's medical personnel.

2. It is too well settled to require citation of authority that the Federal Employee Compensation Act (FECA) precludes recovery under the Federal Tort Claims Act if relief was or is already available under the FECA. Baker v. Barber, 673 F.2d 147 (6th Cir. 1982).

3. The case of Wright v. United States of America, 717 F.2d 254 (6th Cir. 1983), is dispositive of the within action. Injuries which are compensable under the FECA cannot be compensated under other federal remedial statutes such as the Federal Tort Claims Act. Consequently, district courts lack subject matter

jurisdiction to consider an action where there is a "substantial question of coverage" under the FECA. However, within the factual confines of the captioned cause, while the Plaintiff's initial injury is clearly within the coverage of the FECA, damages for the subsequent injury allegedly caused by the medical malpractice of the Defendant's employees may be sought under the Federal Tort Claims Act, because:

a. based upon the record presented to this Court, whether the Defendant's motion is considered as a motion to dismiss for lack of this Court's subject matter jurisdiction or a motion seeking summary judgment, there simply is not a substantial question of coverage under the FECA, due to the fact that the Plaintiff's injuries, allegedly suffered due to the medical malpractice of the Defendant's employees, did not arise out of the special zone of danger created by an obligation or condition of employment. The Plaintiff was

entitled to treatment at the Defendant's facilities both as an employee of the Defendant and as the widow of a deceased serviceman. Her electing to be treated at that facility, however, was not an obligation or condition of her employment. The fortuitous circumstances that the Plaintiff's injuries, which pre-existed the injuries caused by the alleged medical malpractice, occurred during working hours near her place of employment for the Defendant, and were aggravated while she was undergoing treatment in a facility operated by her employer within which she was entitled, but not obligated as a condition of employment, to seek medical care, is not a sufficient relationship to her employment to establish coverage under the FECA. Since there is simply not a substantial question of coverage under the FECA, the district court does not lack subject matter jurisdiction to consider an action under the Federal Tort Claims Act.

b. Moreover, even though the Plaintiff's initial injury was both compensable and compensated under the FECA, the "dual capacity doctrine" enables her to bring the instant action under the Federal Tort Claims Act for her injuries allegedly aggravated by the medical malpractice of the Defendant's employees. The "dual capacity doctrine" treats the employer as a third party outside the protections of the workmen's compensation statute (insofar as non-susceptibility to suit is concerned) under certain conditions. The test is as follows: "An employer may become a third person, vulnerable to tort suit by an employee, if--and only if--he possesses a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person." Wright v. United States, supra, at 259. Within the factual confines of the instant action, as of the time of the alleged

medical malpractice, the employer-employee relationship did not exist because the employer is acting in a second persona (as the provider of medical care in or through a facilty wherein the Plaintiff was not obligated to seek medical attention as a condition of her employment) unrelated to the employer's status as an employer. In short, the Defendant, as of the time of the alleged medical malpractice, was functioning in the capacity of the provider of medical care, not as the Plaintiff's employer. See also Guy v. Arthur H. Thomas Co., 55 Ohio St.2d 183 (1978) (construing Ohio law that furnishes the rules of liability under the Federal Tort Claims Action).

Counsel listed below will take note that a pretrial conference will be had, by conference call telephone communication, at 9:45 a.m. on Wednesday, April 22, 1987, for the purpose of setting a trial date and other dates leading to the expeditious resolution of this litigation. During this

telephone pretrial conference, counsel will be asked whether they would agree to consent to trial of this matter before the United States Magistrate, giving the Magistrate the authority to enter final judgment, with any appeal from the Magistrate's decision and judgment being directly to the United States Court of Appeals for the Sixth Circuit.

/s/Walter H. Rice
Walter H. Rice
United States District Judge

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No. 89-3487

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BETTY D. McCALL Plaintiff-Appellant vs. UNITED STATES OF AMERICA Defendant-Appellee	O R D E R

BEFORE: WELLFORD and NELSON, Circuit Judges; and ZATKOFF*, United States District Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

*Hon. Lawrence P. Zatkoff sitting by designation from the Eastern District of Michigan.